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CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 657

CARNATION COMPANY,

Petitioner,

VS.

PACIFIC WESTBOUND CONFERENCE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS, FAR EAST CONFERENCE, AND MEMBERS AND CERTAIN FORMER MEMBERS THEREOF NAMED AS DEFENDANTS

Opinions Below

Since the petition was filed, the opinion of the United States Court of Appeals for the Ninth Circuit and its memorandum denying petitioner's petition for a rehearing have been reported, *sub nom. Carnation Company* v. *Pacific Westbound Conference,* 336 F. 2d 650.

The Question Presented

We do not agree with petitioner's prolix statement of questions presented and claimed errors (Petition, pp. 4-7). The single question presented by the petition should, we submit, be stated as follows:

> Did not the Court of Appeals correctly hold that the complaint herein, which seeks damages under the antitrust laws on the claim that respondents, common carriers by water in the foreign commerce of the United States subject to §15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814), by concerted action enhanced freight rates charged to petitioner, had been properly dismissed on the ground that the antitrust laws have been superseded, *pro tanto,* by the Shipping Act, and that under the Shipping Act the exclusive primary jurisdiction of the subject matter is confided to the Federal Maritime Commission?

Statement of the Case

Petitioner, at all stages of this litigation, has argued that its claim is one for an overcharge (Petition, p. 2). Convenient as this may be to support petitioner's claim that this is not the kind of case which requires the application of the supersession and primary jurisdiction doctrines, it is fairly apparent from the complaint that the relief sought is not based on an overcharge theory.

The gravamen of the complaint is the enhancement of rates charged to the petitioner by reason of con-

certed action of the respondent carriers, which petitioner claims to have been unlawful concerted action (Complaint, ¶¶18, 25, 26; R. 16-17, 19-20[1]). It is only by such charge of unlawful concerted action that petitioner could lend even the color of antitrust violation to its claim.

It is undisputed that the respondents are common carriers by water in the foreign commerce of the United States, and two conferences of such carriers and the chairmen thereof; that the Pacific Westbound Conference (hereinafter, "PWC"), acting pursuant to a conference agreement duly approved under §15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814), establishes rates, charges, and regulations pertaining thereto for the transportation by its member carriers of property from Pacific Coast ports of the United States to various destinations in the Far East, including ports in the Republic of the Philippines; that the Far East Conference (hereinafter, "FEC"), acting pursuant to an agreement similarly approved, establishes the rates, charges, and regulations pertaining thereto for the transportation of property by its member carriers from Atlantic and Gulf Coast ports of the United States to various Far East destinations, including ports in the Republic of the Philippines; and that, pursuant to an agreement (F.M.C. Agreement No. 8200 (hereinafter, the "Joint Agreement")), FEC and PWC have been authorized to take joint action with respect to rates (Complaint, ¶9, 13, 17; R. 8-9, 9-10, 10-11, 16).

Effective May 1st, 1957, PWC announced an increase in its rates, including an increase of $2.50 per

[1] References to the record certified by the Clerk of the Court of Appeals are cited as "R".

ton applicable to the transportation of evaporated mi
from Pacific Coast ports of the United States to por
in the Republic of the Philippines (Complaint, ¶2
R. 19). At the request of Carnation Company, t
petitioner herein and an exporter of evaporated mil
PWC decided to reduce its evaporated milk rate
$2.50 per ton. PWC requested the concurrence
FEC in said reduction. FEC declined concurrenc
Thereafter, and until May of 1962, Carnation paid t
PWC rate, including the May, 1957, increase of $2.
per ton, on all evaporated milk shipped by it fro
Pacific Coast ports of the United States to the Repu
lic of the Philippines (Complaint, ¶¶24, 25, 28, 2
R. 19-20, 21).

According to paragraph 30 of the Complaint (R. 22
"By reason of the premises and as a result of t
aforesaid unlawful association, combination, conspi
acy and agreement in violation of the antitrust law
of the United States and the aforeaverred violatio
by the defendants of the antitrust laws of the Unite
States and the aforesaid exacting from plaintiff t
aforesaid increase in rates on evaporated milk plainti
has been injured", etc. Thus, in its own pleadin
petitioner has characterized its claim for relief as o
based upon the combined and concerted activities
the respondent common carriers by water, and h
predicated its right to a judgment upon the antitru
laws of the United States. There is no assertion th
the PWC rate which petitioner paid between May
1957 and May of 1962 was not the rate set forth i
the PWC tariffs; the attack is upon the PWC tari
rate and the claim is that the rate would have bee
lower but for the combined activities of FEC an
PWC.

ARGUMENT

I. The question presented, although important, was decided below in accordance with decisions of this Court and conformably to a decision of another circuit.

The importance of the question of supersession of the antitrust laws by the Shipping Act, 1916, as amended, to the extent of the commerce of the United States encompassed within the regulatory program of the Shipping Act, is demonstrated by the two instances in which this Court has granted certiorari in cases where the point was squarely involved. In *U.S. Navigation Co.* v. *Cunard Steamship Company, Ltd.*, 284 U.S. 474 (1932), and again in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), this Court held that the Shipping Act had, *pro tanto*, superseded the antitrust laws, and that the exclusive primary jurisdiction over complaints charging unlawful anti-competitive activities by common carriers by water, or other persons subject to the Shipping Act, rests with the Federal Maritime Commission[2]. In both cases antitrust complaints were dismissed.

Although *Far East Conference* may have brought up to date the terminology in which the rationale was expressed, both decisions proceeded on the theories that the Shipping Act provided an "all-pervasive

[2] The Commission is the latest in a series of agencies which, since 1916, have been charged with the administration of the Shipping Act. See note following 46 U.S.C.A. §804, bound volume, and note following 46 U.S.C.A. §1111, bound volume and pocket supplement.

scheme" for the regulation of anti-competitive activities and competitive methods of ocean carriers; that the economics of ocean transportation is a special field of knowledge within the competence of the Commission, whose day-to-day function it is to apply the statute with the *expertise* acquired through familiarity with the subject matter; and that uniformity and consistency of regulatory policy can best be attained by unitary administration of the regulatory statute, and not by dual regulation under the differing and, in critical respects, antithetical standards of the Shipping Act and the antitrust laws.

As petitioner is at pains to point out, both *U.S. Navigation Co.* and *Far East Conference* were suits seeking injunctive relief. However, the supersession and primary jurisdiction doctrines of those cases were applied with full force and effect in a private suit, against a steamship conference for treble damages under the antitrust laws in *American Union Transport* v. *River Plate & Brazil Conferences,* 126 F. Supp. 91 (S.D.N.Y. 1954). The dismissal of the complaint was affirmed on the opinion below in *American Union Transport* v. *River Plate & Brazil Conferences,* 222 F. 2d 369 (2d Cir. 1955).

It thus appears that none of the reasons for the granting of the writ which are contemplated by Rule 19 of the Rules of this Court is present. As for petitioner's suggestion (Petition, p. 7) that the decision of the Court of Appeals calls for an exercise of this Court's power of supervision, the argument advanced borders on the frivolous. The only sense in which there are clear and undenied averments of the complaint is that a motion to dismiss for failure to state

a claim upon which relief may be granted—akin to the common law demurrer—admits, for the purposes of the motion only, the well-pleaded facts alleged in the complaint.

II. The decision below was correct in principle.

The Court of Appeals analyzed at length the all-embracing regulatory scheme of the Shipping Act (336 F. 2d at 657-664). Petitioner quibbles with the accuracy of some of the paraphrases of certain sections of the Shipping Act which appear in the opinion. However, for the present purpose, only two sections of the Shipping Act need attention. Section 15, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814), directs every common carrier by water, or other person subject to the Act, to file immediately with the Commission a copy or memorandum of every agreement with another such carrier or person, "fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The Commission is directed to disapprove by order, after notice and hearing, any agreement, "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act * * *." The Commission is directed to approve all other agreements. Specific criteria are provided for disapproval of conference agreements or inter-confer-

ence agreements which fail to contain provisions required by the statute. Any agreement not approved or disapproved by the Commission shall be unlawful, and agreements shall be lawful only when and so long as approved by the Commission. Before approval or after disapproval, it shall be unlawful to carry out an agreement. Whoever violates any provision of §15 shall be liable for a civil penalty of not more than $1,000.00 for each day such violation continues.

By asterisks we have indicated the omission above of a number of categories of restrictive agreements required by §15 to be filed with the Commission. We have set forth those categories which clearly encompass the concerted activities for the fixing and enhancement of ocean freight rates alleged in the complaint. Section 15 would seem to provide completely for the substantive regulation of the very kind of agreement which is the subject matter of this suit. It specifies clearly the statutory criteria for legality and illegality of that very kind of agreement.

Section 22 of the Shipping Act, 39 Stat. 736 (46 U.S.C. §821), authorizes "any person" to file with the Commission a complaint "setting forth any violation of this Act by a common carrier by water * * * and asking reparation for the injury, if any, caused thereby." After investigation and by order, the Commission "may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." Thus, for the violation of the system of substantive law of carrier agreements created by §15, the Congress created a complete remedial provision in §22 of the Shipping

Act. Unlike some regulatory statutes (*e. g.*, §§9 and 22 of the Interstate Commerce Act, 24 Stat. 382, 387, as amended (49 U.S.C. §§9, 22)), neither §22 nor any other section of the Shipping Act provides for suits in court to recover damages for violations of the Act or for the saving of remedies at common law or under other statutes.

This combination of substantive and remedial law applicable to ocean transportation, together with the provision of §15 exempting §15 agreements from the antitrust laws, fulfills all of the requirements for supersession laid down in *U.S. Navigation Co.* v. *Cunard Steamship Company, Ltd., supra,* and the cases under the Interstate Commerce Act on which that decision relied.

Petitioner has sought to sidestep *U.S. Navigation* and *Far East Conference* on the ground that they involved applications for injunctive relief, prospective in nature, whereas the present suit seeks damages for past conduct. This difference, petitioner claims, eliminates from the present case the threat of dual regulation which may be present where an injunction inhibiting future conduct is sought. We point out that, inconsistently, petitioner seeks to justify the allowance of the treble damage remedy on the ground that it has not only the purpose of restitution, but also a regulatory and punitive objective (Petition, pp. 14-17). There can be no question but that punitive damages imposed for a past course of conduct will inevitably have an impact upon the future conduct of the party held liable. Thus there is equal danger of dual incompatible regulation whether the remedy sought under the antitrust laws is injunctive or in the

nature of punitive damages. The integrity of the regulatory scheme under the Shipping Act can be maintained only if the consensual restraints on competition, covered in detail in §15 of the Shipping Act, are made to depend for their lawfulness or unlawfulness solely upon the standards erected in §15 of the Act, and not upon the irreconcilable standards of the antitrust laws.

As in the court below, petitioner seeks to make it appear that since *Far East Conference* was decided, this Court has issued decisions which have eroded the substance of its doctrine. To the extent that intervening decisions have, in some instances, held the supersession doctrine inapplicable, the cases may be distinguished on one or more of several grounds: (1) the regulatory statute involved in cases of private parties seeking reparation contained no authorization to the regulatory agency for the award of reparation or damages in any amount whatsoever; or (2) the regulatory statute did not completely cover substantively the conduct charged to be illegal under the antitrust laws; or (3) the regulatory statute clearly contemplated coequal jurisdiction of an administrative agency created by it and of the courts under the antitrust laws. None of the cases involved the Shipping Act, 1916.[3]

Petitioner argues here (Petition, pp. 25-29), as it did below, that under the doctrine of *Great Northern*

[3] *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), did involve the Shipping Act, but did not involve supersession or exclusive primary jurisdiction. The proceeding originated with the Commission and found its way into court on review of a Commission order of approval under §15 of the Shipping Act.

Ry. Co. v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), there is no call for the application of administrative *expertise* in the present case. Petitioner says that it is the ordinary business of courts to determine whether an agreement or conspiracy existed and, if so, whether it was encompassed within the approval of the Joint Agreement between Pacific Westbound Conference and Far East Conference. We point out that the Commission itself has been wrestling with these questions for some time and, in its Docket No. 872, "*Agreement No. 8200-Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*", instituted on October 26th, 1959, the Examiner's Initial Decision of August 30th, 1963, 2 Pike & Fischer Ship. Reg. Rep. 900, has been the subject of exceptions and oral argument before the Commission and is pending final decision. The court below, in its *per curiam* opinion on petition for rehearing, so aptly described the questions appropriate for administrative determination that we merely refer to that opinion (336 F. 2d at 668).

Finally, here as in the court below, petitioner makes a point of what it conceives to be changes in the alignment of the positions of the majority and the minority of the Justices of this Court since *Far East Conference* (Petition, p. 38). The court below (336 F. 2d at 656-7 and n. 11), appropriately rebuffed this approach, which must rest on a philosophy that we have a government of men, not of laws.

We submit that this argument merits equally emphatic rejection by this Court. Whatever may be said in favor of flexibility of the law so that it may evolve

and adapt to social and economic change, cannot be said in favor of law which vacillates with the accidents of names and numbers. Stability, especially in commercial law, has an important and well-recognized social value.

Conclusion

For the foregoing reasons, it is respectfully submitted that the present petition for a writ of certiorari should be denied.

Respectfully submitted,

New York, N. Y.,
December 4th, 1964.

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